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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	CC Docket No. 96-98
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	CC Docket No. 95-185

AT&T'S OPPOSITION TO U S WEST'S REQUEST FOR STAY PENDING JUDICIAL REVIEW

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TABLE OF CONTENTS

Summary

U S WEST's request satisfies none of the four factors the Commission examines in determining whether to grant a stay of one of its orders. That request should therefore be denied.

First, there is no likelihood that U S WEST will prevail on the merits of its appeal. U S WEST is attempting to relitigate claims it previously made, and already lost, before the Eighth Circuit. Its principal argument here is that shared transport can be characterized as a "service," and that a "service" may be made available only through resale under Section 251(c)(4) and not as a network element under Section 251(c)(3). But that argument ignores both the terms of the Act and the holdings of the Eighth Circuit. Shared transport is plainly encompassed within the Act's definition of "network element" in Section 3(29), and it was determined to be a network element by the Commission after careful application of the standard set forth in Section 251(d)(2)(B). Moreover, the Eighth Circuit expressly rejected U S WEST's argument that network capabilities that may be offered as "services" are for that reason exempt from the obligations of Section 251(c)(3), and that holding was compelled by other provisions of the Act that U S WEST does not even cite. U S WEST's further claim that classifying shared transport as a network element is somehow inconsistent with the Eighth Circuit's discussion of the right to provide finished services through network element combinations is likewise factually and legally baseless.

Second, U S WEST has not remotely met its burden of showing irreparable harm. Instead, it has posited a farfetched scenario under which competition will destroy universal service in the time it takes U S WEST to pursue this appeal. No such cataclysm has occurred in the regions of those many LECs that did not adopt U S WEST's and Ameritech's disingenuous "interpretation"

of the First Report and Order's rules on shared transport, and there is no basis for believing it would occur in U S WEST's region if U S WEST complied with the Act. Indeed, even the skeletal data that U S WEST offers in support of its theory are erroneous, and they would be facially insufficient to establish the essential elements of U S WEST's claims even if they were not.

Finally, there is no serious question that a stay of this order would inflict severe harm on competitive carriers, and, more fundamentally, on the public interest in promoting local exchange competition. The Commission has held that providing shared transport as a network element is "particularly important" at this early stage in the development of competition, and that failure to do so would erect a barrier to entry. The Commission is also depending on competition through combinations of network elements, including shared transport, as the principal vehicle for the access competition that will be central to its market-based approach to access charge reform. A stay would frustrate these paramount objectives of the Act.

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Pursuant to the Public Notice issued by the Commission on September 12, 1997, DA 97-1977, AT&T Corp. ("AT&T") hereby submits its opposition to U S WEST's request for a stay[1] of the Third Order on Reconsideration.[2] U S WEST challenges that aspect of the Third Order on Reconsideration that reaffirmed the obligation imposed on incumbent LECs' in the First Report and Order to offer shared transport as a network element.[3]

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[1] See Request for Stay Pending Judicial Review, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (Sept. 9, 1997) ("Stay Request").

[2] See Third Order on Reconsideration and Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (August 18, 1997) ("Third Reconsideration Order"), petns. for review pending sub nom. Southwestern Bell Tel. Co. v. FCC, No. 97-3389 (8th Cir.).

[3] See First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (rel. August 8, 1996) ("First Report and

In determining whether to issue a stay, the Commission relies upon the test established in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). "Under that test, petitioners must demonstrate that: (1) they are likely to succeed on the merits on review; (2) they would suffer irreparable injury absent a stay; (3) a stay would not substantially harm other interested parties; and (4) a stay would serve the public interest."[4] U S WEST's request satisfies none of these requirements.

I. THERE IS NO LIKELIHOOD THAT U S WEST WILL PREVAIL ON THE MERITS.

U S WEST claims that the Third Reconsideration Order will be reversed on appeal on the ground that it is inconsistent with both the 1996 Act and the Eighth Circuit's decision in Iowa Util. Bd. v. FCC. Specifically, U S WEST claims that the Commission's classification of shared transport as a network element under Section 251(c)(3) gives new entrants the right to purchase "access to the entire network" in the form of a "finished service,"[5] and that the Order is therefore unlawful because, under the Act, such services can be required to be made available only through the resale provision of Section 251(c)(4). U S WEST argues that, in contrast to "services" that must be available for "resale," network elements are limited to "dedicated facilities or capacity" identified by the new entrants on a "route-by-route basis within an incumbent's network"

Order"), ¶¶ 258, 439-451, aff'd in part and vacated in part, Iowa Util. Bd. v. FCC, No. 96-3321, 1997 WL 403401 (8th Cir. July 19, 1997).

4 See Order, Access Charge Reform, CC Docket No. 96-262 (rel. June 18, 1997) ("Access Reform Stay Order"), ¶ 4.

5 See Stay Request, p. 12 n.9.

and severable from all other elements.[6] It further argues that, unless this limitation is observed, the distinctions between resale and network elements discussed in Iowa Utilities Board would cease to apply.[7]

This claim is meritless. It is a confused amalgam of two arguments that U S WEST made, and lost, in Iowa Utilities Board: (1) that new entrants should not be permitted to offer "finished services" wholly through combinations of network elements (an argument that is, in all events, inapplicable to the question whether any particular network element, like shared transport, should be required to be made available), and (2) that any network capability that can be characterized as a "service" cannot be held to be a network element. The only way U S WEST can continue to repeat these failed arguments is by distorting the Third Reconsideration Order, ignoring the holdings in Iowa Utilities Board, and misstating the requirements of the Act.

1. To begin with, U S WEST has completely mischaracterized the Third Reconsideration Order. The contention (Stay Request, p. 12 n.9) that "a shared transport unbundled element would give a new entrant access . . . to the incumbent LEC's entire network" is obviously false. A purchaser of shared transport would still need either to obtain from the LEC, or provide on its own, the network interface devices, loops, signalling, switching, databases, and OSS systems that would be necessary to enable it to provide local exchange service to the public. Nor is "shared transport" a "finished service" (id., p. 1) as the Eighth Circuit used that term in Iowa Utilities Board -- i.e., a service subject to the resale obligation of Section

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[6] See id., pp. 10-11.

[7] See id., pp. 9-15.

251(c)(4) -- because it is not a service that the incumbent LEC "provides at retail to subscribers who are not telecommunications carriers." See 47 U.S.C. § 251(c)(4); Iowa Util. Bd., slip op. at 141-144. Given that shared transport is therefore not available under Section 251(c)(4), it is demonstrably wrong to claim (p. 2) that the Commission's order will enable new entrants "to choose between two distinct prices for the very same service."

These patent errors in U S WEST's presentation appear to have arisen because U S WEST has simply recycled the unsuccessful argument it made in the Eighth Circuit against permitting new entrants to provide finished services wholly through combinations of network elements, and mindlessly redirected it at the Commission's shared transport decision. But that argument has no coherent application to the question of whether an individual set of facilities that cannot by itself be used to provide a retail service to end users is properly a network element. The issues are related only in the sense that, as U S WEST no doubt recognizes, a decision eliminating shared transport as a network element would as a practical matter destroy the economics of providing competitive service wholly through combinations of network elements. And because Iowa Utilities Board rejected U S WEST's argument on network element combinations and upheld new entrants' right to compete through such combinations, that fact hardly strengthens U S WEST's claim.

2. Alternatively, insofar as U S WEST is arguing that shared transport cannot be a network element under the Act because it is a "service" to other carriers, U S WEST is seeking to relitigate a different, but equally unsuccessful, claim that it raised in the Eighth Circuit. Indeed, that claim would be foreclosed even if shared transport were an end-user service subject to Section 251(c)(4).

In Iowa Utilities Board, U S WEST argued that "any aspect of telecommunications that can be characterized as a `service' is not a network element subject to unbundling," and the Court emphatically rejected this "narrow interpretation of the Act's definition of `network elements.'"[8] The Court held that "[s]imply because [] capabilities can be labeled as `services' does not [mean] that they were not intended to be unbundled as network elements."[9]

Indeed, the Act provides strong support for this general holding and for the Commission's specific conclusion that shared transport is subject to Section 251(c)(3)'s obligations. The competitive checklist provides that the "access and interconnection" provided by the BOC to satisfy Section 271 must include "[l]ocal switching unbundled from transport, local loop transmission, or other services."[10] It further provides, as the Commission noted in the First Report and Order (¶ 439), that the BOC must provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services."[11]

These provisions support the Commission's decision in at least two ways. First, they show that Congress rejected the view advocated by U S WEST that "services" cannot be elements subject to the unbundling obligation. Congress recognized that transport was an element that had to be provided on an unbundled basis whether or not (in fact, even if) it could be

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8 See Iowa Util. Bd., slip op. at 131.

9 See id. at 133. U S WEST attempts to distinguish this Eighth Circuit holding by claiming (p. 12 n.9) that it applied to "'features of an incumbent LEC's network,'" not to "the incumbent LEC's entire network." Whatever its merits, that distinction has no relevance to this proceeding, for shared transport does not give new entrants access to the incumbent's entire network. See supra p. 3.

10 See 47 U.S.C. § 271(c)(2)(B)(vi) (emphasis added).

11 See 47 U.S.C. § 271(c)(2)(B)(v) (emphasis added).

characterized as a "service."

Second, Congress used the terms "local transport" and "transport." These terms have been defined in literally dozens of court and agency decisions over the last 15 years to include both dedicated and common transport.[12] When Congress legislates in a heavily regulated area against the backdrop of consistent agency and industry usage, and uses a term that has acquired a consistent meaning without specifically defining that term, it is presumed that Congress used the term in accordance with its accepted meaning.[13] And it is absurd to suggest that Congress imposed an obligation in the checklist -- to provide both dedicated and shared transport -- that it simultaneously prohibited the Commission from imposing on all LECs under Section 251.

Moreover, U S WEST never even acknowledges, much less refutes, the other statutory and factual bases for the Commission's conclusion that shared transport is a network element. The Act's definition of "network element" specifically includes "features, functions, and capabilities that are provided by means of" network "equipment,"[14] and shared transport is plainly

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12 See, e.g., Competitive Telecommunications Ass'n v. FCC, 87 F.2d 522, 524 (1996) ("Local transport . . . can be provided over a dedicated line . . . or over a common line. . . ."); Third Memorandum Opinion and Order on Reconsideration and Supplemental Notice of Proposed Rulemaking, Transport Rate Structure and Pricing, CC Docket No. 91-213, 10 FCC Rcd. 3030, 3033 (1994) ("LECs provide some transport services using 'dedicated circuits' . . . . Other transport services are provided using a combination of dedicated circuits and circuits that are 'shared' or 'common' -- that is, the access traffic of several IXCs, as well as other types of traffic in the LEC network, pass over the shared circuits"); Report and Order and Further Notice of Proposed Rulemaking, Transport Rate Structure and Pricing, CC Docket No. 91-213, 7 FCC Rcd. 7006, 7009 n.7 (1992) ("The circuits and equipment used for transport may be dedicated to the use of a single IXC (dedicated transport), used in common by multiple IXCs (common transport), or a combination of the two").

13 See United States v. Hill, 506 U.S. 546, 533-34 (1993).

14 See 47 U.S.C. § 3(29).

covered by that definition. The Act further directs the Commission in defining network elements to consider, "at a minimum," whether the failure to provide access to a non-proprietary element would "impair the ability of the telecommunications carrier seeking access to provide the services it seeks to offer."[15] The Commission explained in detail in the First Report and Order why failure to provide shared transport would impair the ability of new entrants to compete, and also identified numerous other reasons why shared transport is a network element.[16] Indeed, U S WEST is implicitly making here the same claim the incumbent LECs made in their original comments in this docket: that carriers are not "impaired" within the meaning of Section 251(d)(2)(B) by being denied a network element if they can purchase it as a "service at wholesale rates."[17] The Commission properly, and expressly, rejected that claim.[18]

U S WEST nonetheless contends that network facilities and their capabilities cannot be network elements unless they are dedicated to a particular competitive carrier, severable from all other elements, and pre-identified by the requesting carrier. But these principles are made up out of whole cloth. U S WEST provides no support for engrafting them onto the statute, and the Commission properly rejected each one.[19]

Indeed, U S WEST's arguments would call into question far more than shared transport. For example, Iowa Utilities Board expressly noted that "signalling systems . . . are network

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15 See 47 U.S.C. § 251(d)(2)(B).

16 See First Report and Order, ¶¶ 446-447; id., ¶¶ 438-445, 448-449.

17 See id., ¶ 286.

18 See id.

19 See Third Reconsideration Order, ¶¶ 41-43.

elements under the Act." Iowa Util. Bd., slip op. at 132 (emphasis added). And as the Commission explained, signalling "necessarily must be shared among the incumbent and multiple competing carriers"; it cannot be disassociated from the switch; and access to that element "does not require requesting carriers to identify in advance a particular portion of the incumbent LEC's signalling facilities, but instead permits requesting carriers to obtain access to multiple signalling links and signalling transfer points in the incumbent LEC's network on an as-needed basis."[20] As with shared transport, the particular signalling equipment employed will thus vary from call to call. On any given call, the associated signalling message can traverse one particular channel on an A-link to a particular STP, and on the very next call routed by the same switch the signalling message might travel on another channel on the A-link, or even another A-link altogether to a different STP. Each time the path the signal would travel would not be identifiable in advance, and would depend on the availability of A-link channels and load balancing between paired STPs at the particular point in time at which the call is made. Under U S WEST's theory, therefore, new entrants would have no right to obtain access to signalling, as it can never serve as a dedicated resource.[21]

U S WEST's effort to limit network elements to dedicated, severable, and pre-identified facilities thus represents a broad assault on Section 251(c)(3), as interpreted by the

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20 See id.

21 Similarly, Iowa Util Bd. (slip op. at 133) expressly held that "operator services" are network elements. And when a CLEC obtains access to an incumbent's operator call completion services, it obtains access to the entire set of operator facilities shared by the incumbent and all other CLECs purchasing such access. When a customer seeks to connect to an operator, the switch thus selects a circuit based on the network routing structure and circuit availability and, if a live operator is needed, the next available live operator responds to the call. Three consecutive calls will likely employ three different circuits and three different operators, and the transmission path cannot be identified in advance.

Commission in the First Report and Order and affirmed by the Eighth Circuit in Iowa Utilities Board. Such a view would radically and improperly curtail the ability of any competitive carrier to "take advantage of the incumbent LEC's economies of scale, scope, and density."[22]

3. Finally, U S WEST contends (p. 2) that when new entrants provide competitive services by purchasing combinations of network elements that include shared transport, they "eliminate . . . any difference between unbundled network elements and finished services available for resale" and remove the underpinnings of the Eighth Circuit's holding that new entrants may provide service wholly through network element combinations. Specifically, U S WEST claims that the Third Reconsideration Order is inconsistent with the Eighth Circuit's observation (slip op. at 144) that "[c]arriers entering the local telecommunications market by purchasing unbundled network elements face greater risks than those carriers that resell an incumbent LEC's services." U S WEST also asserts (p. 14) that the Order "relieves new entrants of the obligation of combining the network elements they purchase."

These are odd claims, for shared transport was determined to be a network element in the First Report and Order, the Order reviewed by the Eighth Circuit when it held that new entrants may provide service wholly through network element combinations. That should foreclose any claim that the inclusion of shared transport as a network element makes such combinations illegitimate. That is also why U S WEST must now pretend (pp. 1, 11) that the Third Reconsideration Order "reversed course" from the First Report and Order and announced a "newly devised" view of shared transport. But those claims are transparent nonsense. While the Third Reconsideration Order clarified and elaborated upon certain aspects of shared transport that had not been fully developed

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22 See Third Reconsideration Order, ¶ 2.

in the First Report and Order, on the core issue that U S WEST raises -- whether the rules require incumbent LECs to provide new entrants with access to the same transport facilities that the incumbents use for their own traffic -- the Commission correctly held that the First Report and Order had been "clear."[23]

The Eighth Circuit's observations about the differences between network element combinations and resale were thus fully applicable, and remain fully applicable, to combinations that include shared transport. In all events, each of U S WEST's claims of inconsistency is specious.

a. Risk. US WEST claims (p. 12) that permitting access to shared transport "repudiates the Act's requirement that new entrants bear ordinary business risks when purchasing unbundled network elements" different from those incurred by resellers. That is false. First, there are numerous risks such entrants will bear even apart from shared transport. Shared transport is only one of many elements that a CLEC would have to obtain (either from the incumbent or elsewhere) in order to provide service to end users. U S WEST does not appear to dispute -- and cannot dispute -- that the purchase of those elements -- such as the loop, the network interface device, the switch, and so on -- entails risks and costs that resellers do not incur and that are in no way avoided by purchasing shared transport at the same time.

Further, the unique investments and risks that a CLEC using network elements must incur are not limited to the actual purchase of elements. For example, in order to fully utilize network elements, a CLEC will have to incur the expense of developing the internal OSS systems

[23] See Third Reconsideration Order, ¶ 22; see also id. ("Indeed, only Ameritech and U S WEST suggest that the Local Competition Order could be interpreted to require sharing only between multiple competitive carriers").

that will be needed to generate access bills to interexchange carriers and reciprocal compensation bills to the incumbent LEC and other competitors, and to establish systems and processes necessary to verify the network element and reciprocal compensation bills it will receive from the incumbent LEC.

There is thus no conflict with the Eighth Circuit's statement (slip op. at 144) that "[c]arriers entering the local telecommunications market by purchasing unbundled network elements face greater risks than those carriers that resell an incumbent LEC's services." At bottom, US WEST's petition rests on the extreme claim that no aspect of the incumbent's network can be considered a "network element" unless the purchase of that element, viewed in isolation, entails the assumption of an additional set of risks. But U S WEST points to no authority to support that claim, and none exists.

Second, users of shared transport also incur substantial risks even without regard to the other elements that those users obtain and the internal systems they develop. Local exchange service is generally priced on a flat-rated basis, so the charge does not increase as the customer makes more local calls. A new entrant using shared transport to complete those calls, however, pays for the transport on a per-minute basis. Accordingly, provision of local exchange service through use of shared transport could cost a provider more than providing service through resale if, for example, the customer (perhaps an Internet user) makes a significant amount of flat rated local calls with long holding times while making relatively few toll calls. Under those circumstances, the new entrant using shared transport risks losing money while the reseller would be assured of its profit.[24]

b. Combining. Nor does the determination that shared transport is a network element conflict with the Eighth Circuit's holding (p. 141) that "requesting carriers will combine the unbundled elements themselves." Indeed, this argument is frivolous. The holding of the Eighth Circuit was limited to situations in which new entrants order more than one individual network element, and seek to have the incumbent LEC combine those elements in new ways. Here, the Commission has simply defined one particular element.[25]

U S WEST claims (pp. 14-15) that it nonetheless would be "combining" elements every time it routed a CLEC's call through particular transport facilities by "choos[ing] a specific call path for each call and then combin[ing] the network elements along that route for the duration of the call." It might just as easily -- and fatuously -- claim that it "combines" elements when it "chooses" the call path in the switch fabric through which that call is transmitted, the particular signalling facilities that are then used, and the call-related databases from which information must sometimes be extracted. But none of that has anything to do with "combining" network elements. To the contrary, establishing a transmission path through the switch, and then through the network, are among the "features, functions, and capabilities" of the software in the switch and

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[24] As AT&T has previously demonstrated (see Third Reconsideration Order, ¶ 16 n.58), there are numerous other differences between providing service through network elements and providing service through resale. Among other things, a carrier competing through network elements can provide new and different services from those provided by U S WEST to end users -- including offerings that U S WEST has discontinued -- as well as more easily transition into competion through its own facilities.

[25] Further, the Eighth Circuit ruling also applies only as to elements that are not already combined in the network -- an issue not raised here. See Third Reconsideration Order, ¶ 44.

signalling elements, and CLECs obtain the right to use those capabilities when they purchase those elements. See Third Reconsideration Order, ¶¶ 45-46 (access to the switch includes access to the routing table resident in the switch).

II. U S WEST HAS NOT SHOWN THAT IT WILL SUFFER IRREPARABLE HARM

U S WEST contends (p. i) that the Third Reconsideration Order, unless stayed, will cause the "rapid destruction" of universal service. It asserts that its rates to residential customers are below-cost, and that it funds service to those customers only by charging supracompetitive rates to business customers for local service and to interexchange carriers for access services. U S WEST claims that the Third Reconsideration Order will enable new entrants to take away U S WEST's business customers by obtaining network elements at cost and pricing below U S WEST's business rates, and will thus eliminate the source of subsidy for U S WEST's residential services.

To begin with, claims that U S WEST will lose customers to competition do not show irreparable harm. "[R]evenues and customers lost to competition which can be regained through competition are not irreparable."[26] Indeed, the loss of customers by U S WEST will be the inevitable result of the competition that the Act seeks to foster. Far from constituting harm, competition is the very public interest benefit that Congress contemplated.

U S WEST's remaining claims of irreparable harm are the same claims that have been made every time competition has been introduced into the telecommunications industry. Monopolists likewise asserted, for example, that competition in the long-distance market and in

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[26] See Central & Southern Motor Freight Tariff Ass'n v. U.S., 757 F.2d 301, 309 (D.C. Cir. 1985); see also Washington Metro. Area Transit Auth. v. Holiday Tours, Inc., 559 F.2d 841, 843 n.3 (D.C. Cir. 1977) ("mere existence of competition is not irreparable harm").

the provision of customer premises equipment would destroy the subsidies that support universal service.[27] None of those claims has ever been vindicated by subsequent events, and U S WEST's identical claims fail for the same reasons.

Those claims are, to say the least, highly speculative. A party claiming irreparable harm must show that the alleged harm is "both certain and great," "actual and not theoretical."[28] "Bare allegations of what is likely to occur" are not sufficient, because the test is whether the harm "will in fact occur."[29] Here, the suggestion that the harm that U S WEST posits would occur at all -- and particularly during the short time it will take to pursue an appeal of the Third Reconsideration Order -- is especially farfetched.

That is underscored by the fact that shared transport has been held to be a network element since the Commission issued its First Report and Order on August 8, 1996. As the Commission noted, "only Ameritech and U S WEST suggest[ed] that the Local Competition Order could be interpreted to require sharing only between multiple competitive carriers."[30] Yet none of the other regions have experienced the type of meltdown U S WEST now claims is imminent -- or anything remotely close to it. The reality is that no losses could result of the sort U S WEST posits unless (1) significant competition develops before the appeal is concluded, (2) the

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27 See, e.g., "An Unusual Obligation," Address by John DeButts, Chairman of the Board of AT&T, to NARUC Annual Convention (Sept. 30, 1973), quoted in full in So. Pac. Com. Co. v. Amer. Tel. & Tel. Co., 556 F. Supp. 825, 894-902 (D.D.C. 1983) ("the public interest" in "the widest availability of high quality communications at the lowest over-all cost to all its users cannot help but be impaired by the . . . further encroachment of competition").

28 See Wisconsin Gas Co v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985).

29 See id. (emphasis in original).

30 See Third Reconsideration Order, ¶ 22.

competition is sufficiently effective in such a limited period to drive U S WEST's overall revenues below its costs of service, and (3) there are no other remedies available to it. But there is no basis for finding that any of these conditions will exist.

First, it is speculative whether and to what extent any effective local competition will develop in U S WEST's region during the pendency of an appeal, and the incumbent LECs have a history of making unfounded predictions of imminent losses. For example, only last October, the LECs assured the Eighth Circuit that they would suffer losses of critical customers, lost revenues, and irreparable damage to their goodwill if network element rates were established under the Commission's TELRIC standard. But while the States then largely used this standard to establish interim rates for unbundled network elements, there is no significant competition anywhere in the nation today, and the LECs continue earning record profits.

The Commission's conclusion in denying a stay of its Access Charge Reform order is thus fully applicable here:

> [W]ithin the time frame necessary for a court to review the Commission's decision, the level of competition will not be sufficient to make substantial inroads on the incumbent telephone companies' customer bases. . . . [P]etitioner[] . . . submits [no] factual information demonstrating that competition is advancing rapidly in its service territories. In fact, neither [it] nor [its] supporting commenters have submitted any documentation showing that [it] can provide . . . unbundled network elements . . . in quantities that would remotely constitute a competitive threat in the short term.

Access Reform Stay Order, ¶ 33.

Second, even if effective competition develops during the pendency of an appeal, it is speculative whether it would be sufficiently robust to cause U S WEST's overall revenues to drop below its overall costs during that period. New entrants must incur enormous other operational and marketing expenses to establish a market presence. More fundamentally, while it is clear that U S WEST is charging supracompetitive rates to business customers, there is no reason to believe that these are not greatly in excess of the amounts -- if any -- required to support residential rates. So even if competition forces a reduction in U S WEST's rates, that does not mean it will incur losses. In short, the Commission and the Joint Board were on solid ground in concluding that implicit support mechanisms can be maintained during the interim period before universal service reform is fully implemented (and a fortiori during the pendency of an appeal) without impairing the ability of incumbent LECs to provide service or otherwise causing any legally cognizable harm.

In this regard, U S WEST has utterly failed to meet its burden to establish even that its service to residential customers is unprofitable -- and there are good reasons to believe it cannot do so. U S WEST claims that its average cost of providing local service in Colorado, using TELRIC, is $27.32, that its residential rate is $14.58 per month, and that it therefore loses money on the provision of residential service.[31] But this presentation is a sham. It relies on erroneous numbers, and simply ignores substantial sources of revenue that U S WEST receives through the provision of local service to residential customers.

To begin with, U S WEST's numbers are inaccurate. Using TELRIC, the Colorado Commission determined the rate for the UNE platform for residential users to be $22.00, not $27.32, and the $22.00 includes not only cost but profit as well.[32] Further, U S WEST's tariffed

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[31] See Stay Request, Jude Aff., ¶ 6.

[32] See Colorado Docket 96S-331T, Order # C97-739.

rate for residential service is not $14.58, but $14.93.[33]

More fundamentally, even if the monthly rate for residential service is thus lower than the average cost of providing that service, that assuredly does not prove that U S WEST is providing residential service below-cost. U S WEST has ignored its other substantial sources of residential revenue. The difference between the correct figures for the TELRIC rate (even including profit) and U S WEST's monthly residential rate is $7.07 ($22.00 - $14.93). The subscriber line charge is $3.50, which brings that difference down to $3.57. And U S WEST does not even account for the substantial revenues it earns for providing interstate and intrastate access to residential customers,[34] or the enormous margins it receives on vertical features to residential customers. Indeed, the current rate for call waiting in Colorado is $4.50 per month, and its incremental cost can be measured in pennies. Accordingly, while AT&T does not have, as U S WEST does, the data that would be necessary to construct a proper comparison of U S WEST's revenues and costs, it is plain that U S WEST has not remotely met its burden to establish this essential element of its claim -- and probable that, if it made such a comparison, that comparison would disprove its central assertion.

Third, even if U S WEST did incur cognizable losses in the interim, it would then have ample remedies before this Commission and the State commissions. The States have latitude to impose universal support obligations on providers of intrastate services (and many have done

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33 See Colorado P.U.C. Tariff No. 15, Fifth Revised Sheet 48, section 5.2.4.D.

34 U S WEST does not provide this figure. It states, however, that its interstate access revenues from business customers include $14.81 per month per customer in "universal service support." Jude Aff., ¶ 11. Whatever U S WEST may mean by that term, this assertion further confirms the obvious: that residential access provides additional revenues well above the cost of providing it.

so).[35] Further, the Commission has made it explicit that it will work with States to monitor the development of competition and assure that carriers have sufficient revenues to provide service at just and reasonable rates.[36] In all events, the Commission's planned "historic cost" proceeding will provide a remedy if U S WEST has any other legitimate claim as a result of the interaction of the local competition and universal service requirements.

Finally, while any of these reasons provide a sufficient basis to dispose of U S WEST's claim of irreparable harm, it is significant that that claim ultimately has nothing to do with shared transport. It is instead an attack on the Act's requirement of cost-based network element rates, and specifically the States' decision to use TELRIC to determine those rates. U S WEST's claim is that permitting new entrants to provide service through cost-based rates before universal service reforms are fully implemented will cause it irreparable harm. That claim, whatever its merits, would be unaffected by a decision that shared transport is not a network element.

Indeed, GTE made this precise claim in attacking the Commission's TELRIC rules in the Eighth Circuit. It sought to file a Supplemental Brief in the Eighth Circuit making this same argument after the Commission released the Universal Service Order. The Commission's responsive brief, filed before the Eighth Circuit issued its order denying GTE leave to file its brief, fully addressed this claim. As the Commission explained, there was "no evidence" that "the mere availability of UNEs at rates that do not include implicit subsidies" has "drained away significant revenues from the implicit universal service mechanisms that remain in effect under pre-existing

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35 See Universal Service Order, ¶ 831.

36 See id., ¶ 272; see also id., ¶¶ 202, 834.

regulations."[37] Quoting the Universal Service Order (¶ 17), the Commission reiterated that "'at present, the existing system of largely implicit subsidies can continue to serve its purpose.'"[38]

U S WEST is simply quarreling with Congress' decision to require implementation of the Act's local competition requirement of cost-based rates before implementation of its new universal service requirements. Sections 251 and 252 require that access to unbundled elements be offered at cost-based rates within ten months after the February 6, 1996 enactment of the Act. By contrast, Section 254 did not require the Commission to act on the recommendations by the Joint Board on revising universal service support until May of 1997, and then only required that the Commission adopt a "timetable for completion of [the] recommendations" of the Joint Board.[39] Accordingly, Congress unconditionally required that network elements be available at cost-based rates before Section 254 is fully implemented. Like the Commission, Congress recognized that it was highly unlikely that LECs would incur legally cognizable harms in the interim, and knew that in any event they would have fully adequate remedies if they did.

III. A STAY WOULD GREATLY HARM COMPETITIVE CARRIERS AND THE PUBLIC INTEREST IN LOCAL COMPETITION.

Finally, a stay would do tremendous harm to new entrants seeking to provide service through unbundled elements, and thus would substantially impede development of the local exchange competition that will be the central public interest benefit of the Act. The Commission has found that the failure of an incumbent LEC to provide shared transport as a network element "would

[37] See Brief of FCC in Response to Supplemental Brief of GTE Corp., Iowa Util. Bd. v. FCC, No. 96-3321 (filed June 4, 1997), p. 8 (emphasis in original).

[38] See id.

[39] See 47 U.S.C. § 254(a)(1).

significantly increase the requesting carriers' costs of providing local exchange service and thus reduce competitive entry into the local exchange market."[40] It has further found that shared transport is "particularly important" at this early stage in the development of local competition "for stimulating competitive entry into the local exchange market, because new entrants have not yet had an opportunity to determine traffic volumes and routing patterns."[41] Indeed, the Commission found that failing to provide shared transport "would create a significant barrier to entry."[42]

Moreover, the failure to provide shared transport as a network element would make providing competitive local service through combinations of network elements largely infeasible. The Commission is relying on competition through network elements as the critical element in its market-based approach to access charge reform. There would be no prospect of such market-driven reforms of the massively excessive prices now charged for access if U S WEST were to prevail here.

These facts fully establish the harms a stay would cause. U S WEST has adopted an untenable claimed "interpretation" of the First Report and Order's requirements on shared transport for over a year. Now that the Third Reconsideration Order has rendered it truly impossible for U S WEST to maintain that fiction, U S WEST seeks to extend, through a stay, the period in which it can avoid opening its market to competition and surrendering its monopoly. Its request should be denied.

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[40] See Third Reconsideration Order, § 34.

[41] See id., ¶ 35.

[42] See id.. See also id., ¶¶ 50-51 (quantifying "unnecessary costs" and "undu[e] burden[s]" that failure to provide shared transport would impose on new entrants).

CONCLUSION

U S WEST's request for a stay pending judicial review should be denied.

Respectfully submitted,

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